

E-Filed 2/22/11

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DAVID B. PORTEE,
Plaintiff,

v.

COUNTY OF SANTA CLARA, et al.,
Defendants.

No. C 08-3566 RS (PR)

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner against defendants for allegedly destroying evidence which may have exonerated plaintiff. The Court now reviews the second amended complaint pursuant to 28 U.S.C. § 1915A(a).

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of it, if the complaint “is frivolous, malicious, or fails to state a claim upon

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1 which relief may be granted,” or “seeks monetary relief from a defendant who is immune
2 from such relief.” *Id.* § 1915A(b). Pro se pleadings must nonetheless be liberally construed.
3 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under
4 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the
5 Constitution or laws of the United States was violated, and (2) that the alleged violation was
6 committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48
7 (1988).

8 **B. Legal Claims**

9 Plaintiff alleges that defendants (1) Joe Alvarado, property room supervisor for the
10 San Jose Police Department, (2) A. Tovar, a San Jose police officer, and (3) S. Macias, also a
11 San Jose Police officer, violated plaintiff’s rights to due process and to be free from cruel and
12 unusual punishment by destroying evidence that may have exonerated him. Plaintiff also
13 alleges that some evidence related to plaintiff’s criminal case was released to the care of
14 defendant (4) Jack Woodall, also a San Jose police officer. Liberally construed, plaintiff has
15 stated claims against defendants (1)–(3) that are cognizable under § 1983. Plaintiff,
16 however, has failed to allege any wrongdoing by (4) Woodall. Accordingly, the complaint is
17 DISMISSED with leave to amend. Plaintiff shall file an amended complaint addressing the
18 deficiencies discussed above within 30 days from the date this order is filed. The third
19 amended complaint must include the caption and civil case number used in this order
20 (08-3566 RS (PR)) and the words THIRD AMENDED COMPLAINT on the first page.
21 Because an amended complaint completely replaces the previous complaints, plaintiff must
22 include in his third amended complaint all the claims he wishes to present and all of the
23 defendants he wishes to sue, *see Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992),
24 including the claims against defendants (1)–(3) which, when liberally construed, appear to
25 state claims for relief. Plaintiff may not incorporate material from the prior complaint by
26 reference. Failure to file an amended complaint in accordance with this order will result in
27 dismissal of this action without further notice to plaintiff.
28

1 It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
2 informed of any change of address by filing a separate paper with the clerk headed "Notice
3 of Change of Address." He must comply with the Court's orders in a timely fashion or ask
4 for an extension of time to do so. Failure to comply may result in the dismissal of this action
5 pursuant to Federal Rule of Civil Procedure 41(b). Motions for extensions of time must be
6 filed no later than the deadline sought to be extended and must be accompanied by a showing
7 of good cause.

8 **IT IS SO ORDERED.**

9 DATED: February 22, 2011


RICHARD SEEBORG
United States District Judge

United States District Court
For the Northern District of California